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17  
18 UNITED STATES DISTRICT COURT  
19 NORTHERN DISTRICT OF CALIFORNIA  
20 SAN FRANCISCO DIVISION

21 MICHAEL E. DAVIS, aka TONY DAVIS,  
22 VINCE FERRAGAMO, AND BILLY JOE  
DUPREE, on behalf of themselves and all  
others similarly situated,

23 Plaintiffs,

24 vs.

25 ELECTRONIC ARTS, INC.,

26 Defendant.  
27  
28

CASE NO. 10-CV-3328 RS (DMR)

**PLAINTIFFS' OPPOSITION TO  
REQUEST FOR JUDICIAL NOTICE RE  
DECLARATION OF PHILIP S. FRAZIER  
IN SUPPORT OF ELECTRONIC ARTS,  
INC.'S MOTION TO DISMISS AND  
MOTION TO STRIKE PURSUANT TO  
CCP 425.16**

1           **I. INTRODUCTION**

2           In its Request for Judicial Notice in Support of Motion to Dismiss and Motion to Strike  
 3 Pursuant to CCP 425.16, defendant Electronic Arts, Inc. (“EA”) requests, *inter alia*, that the Court  
 4 take judicial notice of the contents of paragraphs 7 through 13 of the Declaration of Philip Frazier  
 5 (“Frazier Decl.”) which EA contends is a summary of its Madden NFL video games pursuant to  
 6 Federal Rule of Evidence 1006. (Dkt. 65, at 1, 4-5.) Plaintiffs do not oppose the Court taking  
 7 judicial notice of the submitted Madden NFL video games, however, Plaintiffs do oppose EA’s  
 8 request for judicial notice with regard to paragraphs 7 through 13 of the Frazier Declaration (Dkt.  
 9 64) on the grounds that those paragraphs contain information that is not “capable of accurate and  
 10 ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed.  
 11 R. Evid. 201(b)(2). Indeed, the available evidence calls the accuracy Mr. Frazier’s testimony into  
 12 question. Moreover, Mr. Frazier offers testimony that cannot be discerned from the Madden NFL  
 13 video games, such as how the games were developed. Accordingly, Mr. Frazier’s testimony is not  
 14 the type of information subject to judicial notice.

15           **II. ARGUMENT**

16           Mr. Frazier’s testimony does not merit judicial notice because it (a) is controverted by  
 17 other available evidence; (b) contains information not easily ascertainable from playing the  
 18 Madden NFL games; and (c) contains subjective opinion.

19                           **A. Mr. Frazier’s Assertions are Contrary to Other Available**  
 20                           **Evidence And Lack Foundation**

21           Mr. Frazier’s testimony does not qualify for judicial noticed unless its “accuracy cannot  
 22 reasonably be questioned.” Fed. R. Evid. 201(b)(2). Here, Mr. Frazier’s accuracy and credibility  
 23 are in question because his assertions are contradict the evidence.

24           For example, Mr. Frazier declares that only the PlayStation 2 and Xbox editions of  
 25 *Madden NFL 09* had historical teams and that “[t]he version (sic) of *Madden NFL* for play on  
 26 other platforms (e.g., PlayStation 3 and Xbox 360) do not include historic teams.” (Dkt. 64, ¶ 12.)  
 27 In fact, the PSP, Nintendo Wii and Nintendo DS Platform Editions of *Madden NFL 09* also had  
 28 historical teams. *See* Declaration of Sony B. Barari in Support of Plaintiffs’ Opposition to

1 Defendant Electronic Arts, Inc.'s Special Motion to Strike Pursuant to Cal. Code Civ. Proc. §  
 2 425.16 (Anti-Slapp) ¶¶ 24, 27-28, 32, 35-36, 40, 43-44, 47, 50, 54, 57-58, 62, 65, 69, 72-73, 77,  
 3 80-81, Exs. 20, 23-24, 28, 31-32, 36, 39-40, 43, 46, 50, 53-54, 58, 61, 65, 68-69, 73, 76-77.  
 4 Because Mr. Frazier's declaration misrepresents facts material to EA's motions, the accuracy of its  
 5 entire contents is questionable and therefore not subject to judicial notice.

6 Furthermore, pursuant to Rule 602, a witness may not testify to a matter unless "evidence  
 7 is introduced sufficient to support a finding that the witness has personal knowledge of the  
 8 matter." Fed. R. Evid. 602. EA seeks to introduce the Declaration of Phil Frazier as a summary  
 9 of the contents of its Madden NFL 09 video games that is supposedly "readily available and seen  
 10 from a review of the games themselves." *See* Frazier Decl. ¶ 6 (Dkt. 64). However, nowhere in  
 11 his Declaration does Mr. Frazier establish his personal knowledge of the games at issue or even  
 12 state that he has ever played the video games. Instead, Mr. Frazier merely states that "[f]rom 2001  
 13 to the present, he worked on the development of Madden NFL." *Id.* ¶ 2. Such testimony is  
 14 insufficient to establish Mr. Frazier's personal knowledge of the contents of the video games or a  
 15 basis for him to provide a summary of such contents. *See* Fed. R. Evid. 602. Again, Mr. Frazier's  
 16 false testimony of material facts demonstrates that he either lacks personal knowledge about these  
 17 video games or is not credible.

#### 18 **B. The Frazier Declaration Contains Evidence Not Easily**

#### 19 **Ascertainable From Playing the Madden NFL Video Games**

20 In his declaration, Mr. Frazier makes a number of statements regarding how the game are  
 21 created or operate. For example, Mr. Frazier states that the following game variables determine  
 22 play: user's input, virtual players' personal characteristics (height, weight, athletic ability,  
 23 experience), crowd noise, and weather. (Dkt. 64, ¶ 10). It is not possible, however, to determine  
 24 the accuracy of such statements from merely playing the game. Moreover, because EA has not  
 25 provided Plaintiffs with access to such game design information, it fails to meet the requirements  
 26 for providing a summary under Rule 1006. *See* Fed. R. Evid. 1006.

27 In addition, Mr. Frazer declares that the game is populated with players, coaches,  
 28 cheerleaders and fans "all designed and rendered by EA's graphic artists." (Dkt. 64, ¶ 8). In fact,

1 the game player has no way of knowing who designed and rendered these game elements, or how.  
 2 Indeed, the fact that some of these game elements are based on likenesses that are licensed by EA  
 3 – including current NFL players, the coaches, and the stadiums themselves – calls into question  
 4 the degree to which all of these elements are fully designed and rendered by EA personnel. *See*  
 5 Declaration of Brian Henri in Support of Opposition to EA’s Motion to Dismiss & Motion to  
 6 Strike (“Henri Decl.”), Exs. 7, 14 -17.

7 **C. The Frazier Declaration Contains Subjective Opinion That is Not**  
 8 **Appropriately the Subject of Judicial Notice**

9 Finally, Mr. Frazier’s declaration is rife with subjective opinion regarding the video games.  
 10 For example, he states that the engineering is “technologically advanced” and the audiovisual  
 11 elements “creative.” (Dkt. 64, ¶ 7.) These components combine to provide “the excitement and  
 12 challenge of NFL football.” (*Id.*) Mr. Frazier opines that the animations are “television-like” and  
 13 sounds are “realistic.” (*Id.*, ¶ 11.) Perhaps, most significantly, Mr. Frazier contends that the  
 14 historic teams do not contain images of actual players. (*Id.*, ¶ 13.) Whether or not the player  
 15 characters in the Madden NFL games are images of actual players is a disputed issue in this  
 16 litigation. Mr. Frazier’s opinion is not properly the subject of judicial notice.

17 **III. CONCLUSION**

18 In light of the inaccuracies, subjective opinion, and unsubstantiated assertions of Mr.  
 19 Frazier’s declaration, Plaintiffs respectfully request that the Court deny EA’s request for judicial  
 20 notice of paragraphs 7 through 13 of the Declaration of Phillip N. Frazier (Dkt. 64).

21 DATED: January 5, 2012

THOMAS WHITELAW LLP

22  
 23 By: /s/ Brian D. Henri

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